United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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12-11-69
841

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22, 683

UNITED STATES OF AMERICA,
APPELLEE,

v.

SIDNEY W. HARDIN,
APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

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2. Whether the Trial Court erred in admitting the testimony of a child who should have been deemed incompetent to testify. (Tr. 24-32).

3. Whether the Trial Court erred in excluding evidence of a prior statement of deceased which was relevant to the deceased's and the defendant's states of mind at the time of the affray. (Tr. 160-165).

4. Whether the Trial Court erred in its instructions to the jury on malice, manslaughter, and self defense. (Tr. 383-401).

This case was not previously before this Court.

References to Rulings

The Court below set forth no such rulings.

JURISDICTIONAL STATEMENT

Appellant was tried in October 1968, in the United States District Court for the District of Columbia and convicted of second degree murder. The Trial Court allowed his petition for leave to appeal in forma pauperis. This court has jurisdiction over the appeal by virtue of 28 U.S.C. §1291.

STATEMENT OF FACTS

Sidney W. Hardin, Defendant, was arrested on June 17, 1967, at 950 Southern Avenue, Southeast, in the District of Columbia, Apartment 202, for the killing of Leslie Fredericks, a friend of some eight years. The testimony at trial concerning the circumstances surrounding the incident was conflicting, but the following was clear. The Defendant and the deceased were close friends and had been out drinking together for some six hours prior to the shooting. (Tr. 194-197). Upon their return to the apartment where both men lived -- Hardin with his wife and three children and Frederick with one child -- a fight ensued. (Tr. 39, 199, 271). As a result of this fight, Defendent shot Leslie Frederick. (Tr. 44, 204).

The testimony at trial conflicted as to who started the fight and as to the exact circumstances occasioning the shooting. The

Government's only witness on the events preceding the shooting was the eleven year old son of the deceased. This boy testified that he was awakened upon the arrival home of his father on June 17. (Tr. 35). He testified that the Defendant started the affray by pushing his father. (Tr. 39). Further, he stated that the Defendant picked up a soda bottle during the fight and hit the deceased over the head with the bottle, breaking it. (Tr. 41). This caused his father to sink to the floor bleeding from his forehead. (Tr. 41). The fight then resumed between the deceased and the Defendant, whereupon they both fell into the hall closet, still fighting. (Tr. 41.) The boy then testified that for some unknown reason his father got up from the closet floor and walked away from the Defendant. (Tr. 43). It was alleged that the Defendant then also arose from the closet, pulled a gun, and shot the boy's father in the neck. The police were then called and the Defendant was arrested. Leslie Frederick died later that morning of pulmonary embolization, that is, a clot obstructing the pulmonary artery and therefore not allowing the blood to be aerated or oxigenated. (Tr. 140).

The Defendant, his wife, and his child testified and presented a completely different version of the events. The Defendant stated that he and the deceased were out drinking and that during this time

the deceased asked the defendant to purchase a pistol. (Tr. 195). The defendant retained the one bullet that was in the pistol and then gave the pistol to the deceased. (Tr. 195). Counsel for the defendant tried to introduce testimony at this point that the deceased wanted to purchase the pistol in order to kill a third person with whom he had had a previous argument. The court refused to admit such testimony. (Tr. 163-165).

After leaving another bar and on their way home, the deceased requested the bullet from the defendant and when the defendant refused, the deceased told defendant to get out of the car. (Tr. 197). The defendant caught a taxi home and when he arrived, the deceased ordered him to leave the apartment. (Tr. 198). The defendant awakened his wife and told her to pack. While she was packing, the defendant went outside to get his truck. (Tr. 198). At this time, the deceased told the defendant's wife that he would kill the defendant if he ever saw him in Southeast again. (Tr. 270). The defendant returned to the apartment and when he tried to eneter the bedroom, the deceased blocked his way. (Tr. 199). As the defendant excused himself and attempted to enter the bedroom, the deceased struck the defendant in the mouth, knocking him into the hall closet. (Tr. 201, 271). The deceased then attacked Hardinin the closet with his fists and feet. (Tr. 202). Upon the

defendant's request, his wife went to call the police whereupon she was attacked by the deceased. (Tr. 203, 273). The defendant then went into the bedroom to get the pistol, which he had given to his wife on his return that night, and he then loaded the pistol. (Tr. 203). Pointing the pistol at the deceased, he told the deceased to leave his hands off the defendant's wife. (Tr. 203). The deceased then grabbed a soda bottle, broke it, and approached the defendant with the jagged end. (Tr. 203). In fear of his life, defendant shot Leslie Fredericks.

The defendant,his wife and his child testified that during the incident the deceased's son was in the other bedroom and could not see the events taking place. (Tr. 272, 324). Corroborating this was the testimony of a police officer who stated that on the morning of June 17, 1967, he asked all the children, including the deceased's son, if they saw what happened, and each acknowledged that he had seen nothing.

At the conclusion of the testimony, the Trial Court again denied defense counsel's motion for acquittal on the charge of second degree murder. The Trial Court then instructed the jury on the burden of proof, witnesses, children as witnesses, presumption of innocence, the law on manslaughter, the law on second degree murder, self-defense and on a dangerous weapon.

(Tr. 383-401). The Trial Court refused to instruct on the offense of assault with a dangerous weapon.

The jury retired and then returned to ask the ranges of sentence on second degree murder and manslaughter. They also asked whether they could render a decision of guilty on second degree murder with a recommendation of leniency. (Tr. 405). The Trial Court instructed them that the sentence should not be a concern of the jury. The jury retired again and convicted the defendant of second degree murder. The defendant was sentenced for a term of from 8 to 24 years in prison.

STATUTES INVOLVED

District of Columbia Code, Title 22, Section 2403:

Whoever with malice aforethought, except as provided in Sections 22-2401, 22-2402, kills another, is guilty of murder in the second degree.

District of Columbia Code, Title 22, Section 2405:

Whoever commits manslaughter shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding fifteen years, or by both such fine and imprisonment.

STATEMENT OF POINTS

1. The Trial Court erred in its denial of defendant's motion for acquittal of the charge of second degree murder (Tr. 152-55, 325-28).

2. The Trial Court erred in admitting the testimony of a child who should have been deemed incompetent to testify (Tr 24-32).

3. The Trial Court erred in excluding evidence of a prior statement of deceased which was relevant to the deceased's and the defendant's states of mind at the time of the affray. (Tr. 160-165).

4. The Trial Court erred in its instructions to the jury on malice, manslaughter, and self-defense. (Tr 383-401).

ARGUMENT

I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR ACQUITTAL OF THE CHARGE OF SECOND DEGREE MURDER

The defendant made a motion for acquittal of the charge of second degree murder both at the end of the Government's case and prior to the charge to the jury. (Tr. 152, 325). The standard to be used by the court in assessing a motion for acquittal is well established. In ruling, the Trial Court must assume the truth of the Government's evidence and give the Government the benefit of all legitimate inferences to be drawn therefrom. In this posture, if the evidence is such that a reasonable juror must necessarily have a reasonable doubt, the judge must require acquittal. Curley v. United States, 81 U.S. App. D.C. 389, 160 F 2d 229, cert denied, 331 U.S. 837 (1947). Stated another way, a reasonable juror must have had a reasonable doubt as to the elements of second degree murder. Belton v. United States, 382 F 2d 150 (.D.C Cir., 1967). Utilizing this standard, it is contended that the trial court should have granted the defendant's motion for acquittal of second degree murder.

Second degree murder is the unlawful killing of another with malice aforethought. 22 D.C. Code §2403 (1967). Manslaughter, on the other hand, is an unlawful killing in the sudden heat of passion - whether produced by rage, resentment, anger, terror or fear - with adequate provocation such as might naturally induce a

reasonable man in the passion of the moment to lose self-control and commit the act on impulse and without reflection. Austin v. United States, 382 F 2d 129 (1967); see Bishop v. United States, 71 App. D.C. 132, 136-37, 107 F 2d 297, 302-303 (1939). While not every battery is sufficient to constitute adequate provocation, a hard blow inflicting considerable pain will ordinarily be sufficient. Further, if the parties have engaged in a mutual affray, that is, one in which both enter willingly, the law recognizes that if the fight reaches proportions that are sufficient to arouse the passions of the ordinary reasonable man, there is mutual provocation. Perkins, Criminal Law, p. 49 (Foundation Press 1957). In such situations, the question of which person has struck the first blow is irrelevant. Ibid. Use of a deadly weapon does not negate a mutual combat situation. If after an exchange of blows on equal terms, one of the parties suddenly and without any such intention at the commencement of the affray, snatches a deadly weapon and kills the other, such killing is manslaughter. Wharton, Criminal Law and Procedure, Vol. I, p. 596 (Anderson ed. 1957)., and cases cited therein.

The Government's evidence in the present case shows a mutual affray. Even if it be admitted that the fight began by the defendant pushing the deceased (although the defendant and others testified to the contrary) it is clear that both parties fought

willingly. There was no evidence that the deceased was required to strike blows in his own self-defense, but rather the opposite was true. The only Government witness, the deceased's son, said: Well, Sid and him had a fight. (Tr. 36). Later he stated: Well, they started fighting. This clearly points to a mutual affray. Although the boy testified that the defendant hit the deceased over the head with a bottle during the fight, it is clear that the deceased then resumed the fight willingly. The boy stated:

> Q. And you said your dad got up again. What happened after your dad got up?
>
> A. After he got up they started fighting again.
>
> Q. Both of them started fighting.
>
> A. Yes.

After continued moments of fighting, the deceased and defendant fell into the closet. The Government's testimony then shows the deceased walking away and the defendant then shooting the deceased. It is clear that this testimony, at the very least, shows a mutual affray which provoked defendant adequately to shoot the deceased in the heat of passion. This is manslaughter, not second degree murder.

Such an analysis is bolstered by defendant's testimony and that of his wife as to the events proceding the affray--none of which was contradicted by the Government. It was stated that the pistol was bought at the urging of the deceased, (Tr. 195), and

that the deceased subsequently threatened to kill the defendant if he was ever in Southeast again. (Tr. 270). These facts show a bellicose mood of the deceased on the night of the incident, further supporting the fact that the deceased willingly and voluntarily entered into a mutual affray.

On the basis of assuming the truth of the Government's evidence and giving such inferences as can be logically drawn therefrom, it seems clear that a reasonable juror must have had a reasonable doubt as to the elements of second degree murder.

ARGUMENT

II

THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF A CHILD WHO WAS NOT COMPETENT TO TESTIFY

The Government's sole evidence to the incidents surrounding the affray was the uncorroborated testimony of the eleven-year-old son of the deceased, Leslie Fredericks. It is contended that this child's conpetency to testify was not sufficiently established and that his testimony should have been excluded.

In the absence of a statute, it is held that there is no precise age which defines the capacity of a child to testify. See Doran v. United States, 92 App. D.C. 302, 205 F 2d 717 (1953), cert. denied, 346 U.S. 828; Beausoliel v. United States, 71 App. D.C. 111, 107 F 2d 292 (1939). Wharton, Criminal Evidence, vol. III, p. 85 (12 ed. 1955). In Beausoliel, this Court stated that:

> The proper test in determining the qualifications of a witness is not whether he believes in the devil or that liars will be punished after death, but whether the child has sufficient intelligence to have a just appreciation of the difference between right and wrong and a proper consciousness of the punishment of false swearing.

107 F 2d at. 294. In Doran, the Court again followed this test and allowed the trial court to resort to any examination which

would disclose the child's understanding of right and wrong and the child's capacity of observation, recollection and communication 205 F 2d at 719. The competency of a child is a matter within the discretion of the trial judge and his decision will not be disturbed unless clearly erroneous. Ibid.

When the eleven-year-old took the stand in the present case, he stated that the punishment for telling a lie was that he had to go to his room. (Tr. 26) Although the trial court told him of perjury and going to jail, there was no testimony indicating that he understood the meaning of perjury. At this point, defense counsel objected to the competency of the witness, whereupon the trial court ruled that "if he is in fear of going to jail that is good enough." (Tr. 27). It is submitted that such a test is contrary to the rulings of this court in Doran and Beausoliel, because it fails to evaluate the child's capacity of observation, recollection and communication.

Although the trial court directed additional questions to the child dealing with church, sports and schooling, none of this inquiry sufficiently tested the child's intelligence which was questionable due to the fact that he was eleven years old and only in the fourth grade, after having repeated the first and second grades. When the child was asked where he went to school in the first and second grade, he could not recall. (Tr. 31).

When asked about multiplication, the child replied: "We studied about the ones where you have an X on the thing, on the paper." (Tr. 31). Most of the other questions asked of the child were in the form of leading questions to which he replied Yes or No, thus failing to assure the court whether he truly understood the queries.

It is submitted that under the circumstances of a trial of a man for second degree murder with a possible sentence of life imprisonment where the Government's case rests solely upon the testimony of this eleven-year-old child who is obviously sub-average in intelligence (having repeated the first and second grade), the trial court should have conducted a more extensive inquiry into the child's intelligence and recollection. The court should have focused on events and studies of more than a year prior to trial since his testimony was to deal with events at that time. Pointing up this error is the fact that when defense counsel asked the boy which school he had finished the day prior to the affray, the child could not remember, even though he had been there one year. (Tr. 51). The child then stated that he finished the third grade in June, 1967, which leaves unanswered whether he had to repeat the third grade since he was in the fourth grade at the time of the trial, one and one-half years later.

It is, therefore, clear that the trial court was clearly erroneous in finding the child competent to testify on the basis of such scanty questioning and by using a test of fear of going to jail. This error was clearly prejudicial to defendant's rights and even though trial counsel failed to object, it was plain error requiring reversal under Rule 52(b) Fed. R. Crim. P.

ARGUMENT

III

THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF A PRIOR STATEMENT OF DECEASED WHICH WAS RELEVANT TO THE DECEASED'S AND THE DEFENDANT'S STATES OF MIND AT THE TIME OF THE AFFRAY

Defendant's entire defense rested on a claim that he acted reasonably in killing the deceased during the course of a dispute. Obviously the nature of the dispute is dependent on the actions and reactions of the deceased and the defendant. In this case, the defendant attempted to show that dispute arose after the defendant refused to give the deceased, who had been drinking, a gun, after deceased stated he wanted to use the gun against another man. Evidence to this effect would demonstrate (1) that it was reasonable for the defendant to believe that deceased was a danger not only to the man whom deceased wanted to kill but to the defendant and his family if he resisted deceased's demands and (2) that his action during the dispute in trying to stop the defendant including the use of a gun was reasonable and

protected by the law.

During the course of the trial defendant attempted to introduce evidence in the form of statements made by the deceased to the defendant that would show the nature of the dispute. However, the trial court refused to allow in this evidence in the following colloquy set forth on pages 163-165 of the transcript:

MR. GARBER: Now, of course, physically he can testify as to what the deceased did, but I think--

THE COURT: Yes, but he certainly can't testify as to some alleged conversation the deceased had with him about somebody else.

THE COURT: The Court would instruct you that you can't say it in your opening statement or get it in in any other way.

MR. GARBER: Well, I think I can certainly relate the things that were communicated to him by the deceased.

THE COURT: Yes, of course.

MR. GARBER: Threatened to kill him.

THE COURT: But insofar as making the statement about someone else, that simply would not be admissible.

MR. GARBER: The whole point was how this deceased Fredericks wanted this gun himself. He apparently had been

drinking and had decided he wanted to use the gun against another man.

I think it is very probative here and of course if Your Honor rules that I cannot bring this out in evidence, I would object to that ruling and I would like to put it on the record now to preserve the point.

THE COURT: It is so noted.

MR. GARBER: I think too it should be admissible because it also shows a chain of circumstances and these conversations show how it affected this man's state of mind and his belief as to what might happen to him and his wife on the basis of not only that circumstance but what he personally knew about this man in the past.

THE COURT: The conversations having to do with the other man certainly do not bolster a self-defense defense.

MR. GARBER: Not in and of itself, but taking -- I just refer the Court's attention to Wigmore's treatise on evidence. I believe it is section 176, which has to deal with the area of hearsay circumstances as opposed to evidence to prove a conversation from the fact, if it was made, how it affected the state of mind, as opposed to proving a conversation for the purpose of establishing the truth of what was said.

In other words the hearsay rule wouldn't apply to the former case as to the latter.

THE COURT: I will be glad to hear from you, Mr. Silbert.

MR. SILBERT: Your Honor, I don't know any way he can say what the decedent wanted to use the gun for.

I think if he wanted to say they were arguing about who was going to have the gun, I think that would come in, but not what the decedent said he was going to use the gun for.

I agree with Your Honor's ruling that he can't go into anything about a statement like that.

THE COURT: That is correct. That is impossible for anything today.

MR. GARBER: I make the proffer and, of course, the Court has ruled.

The argument made by defense counsel is clearly correct with one minor error of recollection - that the section in Wigmore is §1790 rather than §176. See also Wigmore §247, McCormick, 270. It is clear as Wigmore states, that the condition of a speaker's mind, as to knowledge, belief, rationality, emotion, or the like, may be evidenced by his utterances, and that such utterances are not hearsay and are admissible in evidence.

Utterances made by the deceased have several aspects (1) as indicating the violent intent on the part of the deceased or a violent state of mind; (2) as indicating the reasonable apprehensions of the defendant, defending himself during the course of the dispute; and (3) as circumstantial evidence establishing the truth of such utterances. It has been stated that evidence of both communicated and uncommunicated threats made by the deceased are admissible in evidence as support of a defense of self-defense. e.g., State v. Finn, 243 S.W. 2d 67 (Mo., 1951), Wigmore §247. See also Evans v. United States, 107 U.S. App.,D.C., 324, 277 F 2d 354 (D.C. Cir., 1960); Griffin V. United States, 183 F 2d 990 (1950).

If failure to instruct jury on such threats, where such evidence is admitted is reversible, e.g. State v. Bounds, 305 S.W. 2d 487 (Mo., 1957), then failure to permit in such evidence, is a fortiori, reversible error.

ARGUMENT

IV

THE TRIAL COURT ERRED IN ITS INSTRUCTIONS TO THE JURY ON MALICE, MANSLAUGHTER, AND SELF-DEFENSE

The Trial Court instructed the jury on, among other things, second degree murder, manslaughter, and self-defense. (Tr. 383-401).

1. On second degree murder and malice, the court stated: If a person uses a deadly weapon in killing another, malice may be inferred from his use of such weapon in the absence of explanatory or mitigating circumstances. (Tr. 395). It is contended that this statement prejudiced the jury to a finding of malice and second degree murder. This Court has impliedly recognized this in Williams v. United States, 403 F 2d 176 (D.C. Cir. 1968). The court stated there in regard to a similar instruction:

> In appellant's view, the reference to explanatory or mitigating circumstances, without some reference to what such circumstances might be in this case; unduly weighed the scales toward a finding of malice. But by convicting appellant of the lesser included charge of manslaughter, the jury apparently found that, because of explanatory or mitigating circumstances the killing was committed without malice. Id. at 130.

In the present case, the jury convicted the defendant of second degree murder with malice. Accordingly, it is clear that there was prejudice to defendant in the trial court's failure to convey

to the jury any explanation as to what explanatory or mitigating circumstances are.

2. In the charge to the jury on manslaughter, the trial court utilized a portion of No. 88, the Standard Jury Instructions prepared by the Junior Bar Section. (Tr. 397-398). However, the court did not state to the jury the fact that a blow or other personal violence may constitute adequate provocation. Nor did the trial court explain to the jury the circumstances of a mutual combat. The court merely stated that manslaughter occurs when the homicide is committed at the time of mutual combat... (Tr. 396). Due to the testimony in the case indicating that the fight between the deceased and the defendant was a mutual affray which both entered willingly, it was prejudicial to the defendant to give the case to the jury solely in the posture of determining who was the aggressor. If the jury was properly instructed as to the legal circumstances of a mutual affray (Supra, page _____), the determination of who was the aggressor (which was in great dispute and which was the essence of the instruction on self-defense), would have been unnecessary. A verdict of second degree murder might not then have been forthcoming.

In addition to the above error in the manslaughter charge, the trial court erred in failing to instruct the jury that a manslaughter verdict might be rested on recklessness. In United States v. Dixon,

____ F 2d ____ (No. 22,324, March 27, 1969), this Court of Appeals, in the concurring opinion of Judge Leventhal, suggested such an instruction. It was stated:

> And so we see that the use of standard instructions put before the jury the possibility of a murder verdict based on recklessness, even in the absence of an intent to kill. But there was no instruction whereby a manslaughter verdict might be rested on recklessness, or any other element indicative of culpable negligence. Instead manslaughter was equated with shooting in the heat of passion.
>
> I respectfully submit that the customary instructions stand the law of criminal homicide on its head when they use recklessness as the basis of verdict only in the instruction on second degree murder, and omit an instruction for a manslaughter verdict based on criminal negligence. Id. page 6.

It is submitted that the defendant's conduct in the present case could have been viewed by the jury as reckless to a lesser degree than the "recklessness which displays depravity and such extreme and wanton disregard for human life as to constitute malice." Consequently, the failure of the trial court to so instruct, even in the absence of objection by counsel, was prejudicial and constitutes plain error within the meaning of Rule 52(b), Fed. R. Crim. P.

3. In the charge to the jury on self-defense, the trial court varied from the instructions provided by the Junior Bar Section. (Tr. 398-420). Due to the fact that the defendant's case was based entirely on self-defense, the court should have given more attention to its instructions in this area than it

apparently did. The trial court failed to give any guidance to the jury that the reasonableness of the defendant's action should be judged according to his state of mind at the time of the affray. As this Court of Appeals stated in Inge v. United States, 356 F 2d 345, 348 (1966), "a belief which may be unreasonable in cold blood may be actually and reasonably entertained in the heat of passion. Failure of the trial court to so instruct constituted plain error affecting substantial rights under Rule 52(b) and a new trial was ordered. Ibid.

In the present case, there was no specific reference in the instructions to the degrees of reasonableness in the context of hot blood-cold blood. Accordingly, Inge demands that this court order a new trial due to the prejudice to defendant's rights.

Even if these individual errors [1/] are considered by the Court individually as harmless error, it is contended that their cumulative effect was prejudicial to the rights of the defendant and constituted plain error within the meaning of Rule 52(b), Fed. R. Crim. P.

1/ It is also submitted that the failure of the trial court to instruct on assault with a deadly weapon and causation was plain error due to the fact that these issues were fairly raised by the evidence. (Tr. 328-330). See Heideman v. United States, 104 U.S. App. D.C. 128, 249 F 2d 943 (1958); Tatum v. United States, 88 U.S. App. D.C. 386, 190 F 2d 612 (1951).

CONCLUSION

In view of the serious and prejudicial errors by the Trial Court in allowing an incompetent child to testify, in refusing to admit relevant testimony showing the states of mind of the defendant and the deceased, in failing to charge the jury properly on malice, manslaughter, and self-defense, this Court should reverse the conviction of Sidney W. Hardin.

Respectfully submitted,

Kenneth F. Hickey
Robert J. Hickey
Counsel for Appellant
(Appointed by this Court)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,683

UNITED STATES OF AMERICA, APPELLEE

v.

SIDNEY HARDIN, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
ROGER E. ZUCKERMAN,
Assistant United States Attorneys.

Cr. No. 1214-67

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TABLE OF CASES

* Cases chiefly relied upon marked in asterisks.

QUESTIONS PRESENTED *

In the opinion of appellee, the following questions are presented:

1. Was the trial court's determination that eleven year old Leslie Fredericks was competent to testify clearly erroneous?
2. Was the evidence supporting the charge of murder in the second degree sufficient to send that issue to the jury?
3. Did the trial court err in not allowing appellant to testify to a threat uttered by the deceased to him concerning a third person not a part of this proceeding?
4. Did appellant sustain prejudice to substantial rights by any of the trial court's instructions?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,683

UNITED STATES OF AMERICA, APPELLEE

v.

SIDNEY HARDIN, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment, appellant was charged with murder in the second degree. After a trial before United States District Court Judge June L. Green sitting with a jury on October 8, 10 and 11, 1968, appellant was found guilty as charged. He was sentenced to a term of imprisonment from eight to twenty-four years. This appeal followed.

The Government at trial relied heavily on the testimony of the decedent's son, Leslie Fredericks, Jr., an eyewitness to the offense. Leslie was not quite ten at the time of the offense (Tr. 51). He was eleven at the time

of trial (Tr. 25). After extensive questions by the trial judge, he was deemed competent to testify (Tr. 25-32).

On June 17, 1967, Leslie Jr. lived with his father, Leslie Fredericks, Sr.,[1] at 950 Southern Avenue, S.E., Washington, in apartment 202. They shared one bedroom of the small two-bedroom apartment. (Tr. 32, 35). In the other bedroom lived appellant and his wife and their three children (Tr. 33, 34.)

On the day previous to June 17, 1967, a Friday, school had ended for the term. Leslie Sr. and appellant left the apartment in the evening. Leslie Jr. remained at home, along with appellant's wife and his three children. Leslie Jr. fell asleep in the living room; he later awoke and went to his bedroom again going to sleep. (Tr. 33, 56) Sometime thereafter, late at night, Leslie Jr. was awakened by his father after his return to the apartment. They had a short talk in their bedroom. (Tr. 35, 56)

Then, as Leslie Sr. was standing in the bedroom door, Leslie Jr. saw appellant shove Leslie Sr. against a wall. Still in the bedroom, but with a clear view of the action, Leslie Jr. saw his father and appellant begin fighting. From a container of soft drink bottles near the dinette, appellant grabbed a "Diet Rite Cola" bottle and hit Leslie Sr. in the forehead with it, the bottle breaking. Leslie Sr. staggered into the kitchen and fell, his hands on his bloody forehead. (Tr. 36, 38, 39, 40, 41, 42.) Leslie Sr. had no weapon at this time or thereafter (Tr. 39).

Leslie Sr. arose from the floor and the fight resumed, the two combatants falling into the hall closet (Tr. 42). Leslie Sr. then left the closet area and the fight; he walked into the living room. Appellant left the closet and walked to the middle of the dinette-kitchen area. From his pocket, appellant then removed a gun and shot Leslie Sr., standing some 15 to 18 feet away in the living room. (Tr. 43, 44.) Leslie Sr. fell to the floor. (Tr. 45.)

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[1] Throughout the trial, Leslie Fredericks Sr., the deceased, was often referred to as "Buddy".

Appellant then went into bedroom and announced to his wife, "I meant to shoot him in the head" (Tr. 45).[2] Thereafter, as he went to get a towel to put under the victim's neck, appellant said "let the (cuss word) die" (Tr. 46).[3] Then appellant gave the gun to his wife, telling her to hide it (Tr. 75).[4]

Leslie Jr. testified that throughout these events, virtually all of which he saw, appellant never asked his wife to call the police. (Tr. 47, 71.) Nor did appellant's wife make any effort to call the police (Tr. 47). Finally, Leslie Jr. testified that the deceased never struck appellant's wife during the offense (Tr. 71). Leslie Jr. testified that he was telling the truth about the events of the night in question (Tr. 95).

Several of the investigating police officers then testified. Officer Richard R. Henry testified that he responded to 950 Southern Avenue, S.E., apartment 202, at 2:30 a.m. on Saturday morning, June 17, 1967. He observed a semi-conscious bleeding individual lying in the living room. He observed appellant outside the apartment, with several scratches. Appellant's wife was calm and unbruised. (Tr. 97, 100, 109.) Detective Lee R. Halloran also responded to the scene. From appellant's wife's pocketbook, Detective Halloran recovered a .38 caliber revolver. (Tr. 110, 111.) Detective William H. Booth also responded. He testified that Government's exhibits 6-10, pictures of the apartment, accurately described the premises as he saw them. Lying on his stomach, in the living room, the deceased was 10 to 14 feet from the kitchen area. Appellant's wife was unbruised and not disheveled in any way. (Tr. 118, 120, 125, 130, 131.)

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[2] Appellant's extraordinarily sketchy one-paragraph account of the Government's case at trial (App. Br. 2-3) omits all mention of this statement.

[3] Appellant in his fact statement omits reference to this remark.

[4] Appellant omits reference to this in his brief as to virtually all of the Government's evidence at trial following thereafter, preferring to spend several pages detailing conflicting defense evidence rejected by the jury.

Detective Booth also testified that Leslie Jr., the decedent's son, was crying and upset. He was in the company of appellant's three children when the Detective approached and asked the group if they knew what happened. He received a negative response from the group. (Tr. 134.)[5] Two days after the offense, Leslie Jr. gave a detailed statement to the police, made available to the defense at trial as Jencks material (Tr. 49).

Deputy Coroner Brownlee testified that on Saturday, June 17, 1967, he had performed an autopsy on the deceased, at that time 40 years of age, 5'9" tall and weighing 171 pounds. Lacerations were found on the deceased's mid-forehead the cause of which might have been a bottle. A missile wound was found in his neck, the slug recovered from the back of the neck. The bullet had fractured the neck, injured the main windpipe and severed the esophagus. The immediate cause of death was pulmonary embolization, a blood clot obstructing the pulmonary artery. Embolization occurs when a person is *in extremis* and was caused in this case by the gunshot wound and its effects. (Tr. 135-136, 137, 138, 140.)

It was stipulated that the slug recovered from the deceased was fired from a weapon similar to the .38 caliber revolver recovered by Detective Halloran from appellant's wife (Tr. 150).

Motion for judgment of acquittal was made by appellant and denied (Tr. 152, 155).

Through his testimony, that of his wife and child, appellant presented a claim of self-defense. Admitting that he shot the deceased, appellant testified that he purchased the murder weapon and a bullet on Friday evening outside a tavern where he and the deceased had

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[5] Appellant in his brief describes this event in misleading fashion (App. Br. 4). He omits to mention that at this time Leslie Jr. was crying and upset. And he fails to note that when Leslie Jr. was asked if he saw what happened, he was in company of the children of appellant, the man who had just shot his father. Finally, the Detective's testimony suggests that he did not direct a specific question at each child but rather asked the group of four children generally if they saw anything.

gone to drink. After an argument with the deceased, an allegedly belligerent man, appellant was ordered by him to pack his belongings and leave the small apartment. He returned to do so. Appellant claimed that while he was attempting to leave, the deceased attacked his wife and him; he shot the deceased in the neck while the deceased advanced on him with a bottle. Appellant claimed he shot the deceased in the kitchen. Leslie Fredericks Sr. then crawled into the living room where he lay until police arrived. (Tr. 195, 198, 199, 202, 203, 204, 205, 229, 243, 247, 251.)

In apparent support of this testimony, appellant's wife testified. The testimony she presented, however, differed in several respects from that offered by appellant. Whereas appellant testified that he arrived home from work that Friday evening prior to the deceased, who came home after having been drinking (Tr. 192), Mrs. Hardin testified that appellant and the deceased arrived home on Friday night together (Tr. 267).[6] Appellant testified that when he returned late that evening to pack and leave, he gave the pistol he purchased to his wife and she put the gun in her purse, hiding the purse on the closet shelf in the bedroom. There it remained until appellant allegedly got it to fend off the on-rushing deceased. (Tr. 198, 203, 233) Mrs. Hardin, however, claimed that appellant gave her the gun to hide and after placing it in her purse, she placed the purse in a carton in the center of the bedroom (Tr. 301). Mrs. Hardin claimed it was from this place that appellant grabbed the gun to defend himself (Tr. 269, 202, 301).[7] Appellant described a major aspect of the deceased's attack as one in which the deceased kicked him while he lay in the closet, the deceased bracing himself by placing his hands on the nearby walls (Tr. 202, 203) Mrs. Hardin, how-

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[6] Appellant fails to note this conflict anywhere in his brief.

[7] Appellant fails to note this conflict, a crucial aspect of the trial. It was the Government's theory, as Leslie Jr. testified, that appellant got the gun from his pocket, not the bedroom.

ever, described this phase of the attack as one in which the deceased pummelled appellant in the closet with his fists as well as his feet (Tr. 272, 273).[8] Appellant testified that his wife had attempted to call the police at his request standing in the middle of the living room (Tr. 245). Mrs. Hardin testified that she sat on the edge of the living room couch while trying to dial the police (Tr. 293).[9] In describing the attack on Mrs. Hardin which allegedly followed thereafter, appellant claimed the deceased took hold of the telephone base with his right hand and held Mrs. Hardin's blouse with his left hand, preparing to strike her with the phone (Tr. 245, 246). Mrs. Hardin, however, testified that the deceased grabbed her blouse, causing her to put down the receiver and run toward the bedroom. It was only at this juncture, she indicated, that the deceased first picked up the telephone base and allegedly tried to throw it at her (Tr. 294, 298).[10]

Appellant's daughter, ten year old Gale Hardin, testified. She said she saw little of the fight, except a portion in which the deceased punched appellant near the closet (Tr. 317, 324).

After closing argument and instructions appellant was found guilty of second degree murder.

ARGUMENT

I. The trial court's determination that Leslie Fredericks Jr. was competent to testify is not clearly erroneous.

Appellant attacks the competence of the deceased's eleven-year-old son, Leslie Fredericks, Jr., to testify against him at trial. He urges in the main that the trial court failed to conduct a sufficiently extensive examination of young Leslie's ability to observe, recollect and communicate the events at issue (App. Br. 12-15). We think this contention borders on the frivolous.

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[8] Appellant omits all reference to this discrepancy.

[9] Appellant omits all reference to this discrepancy.

[10] Appellant omits all reference to this discrepancy.

It is beyond dispute that the testimonial qualification of a witness lies within the discretion of the trial court.[11] Because the exercise of that discretion often rests on factors at trial which "cannot be photographed into the record", it should not be disturbed except where "clearly erroneous".[12] Appellant has demonstrated nothing to so mark Judge Green's determination concerning the deceased's son.

First, we note what appellant obviously must avoid, that his own ten year old daughter testified at trial and was qualified with questions vastly and answers much less articulate and less extensive than those directed toward Leslie Fredericks Jr. (Tr. 315-317). Appellant apparently finds such procedure acceptable where it involves his own witness.

Appellant is vague as to the precise inability he finds in Leslie Jr.'s testimonial abilities. There is nothing, save appellant's own testimony, to discredit Leslie's statements that he saw the events in question. And the jury, who heard Leslie Jr. testify and saw his demeanor paid appellant's testimony in this regard no heed. Nor does the record suggest any impairment of Leslie Jr.'s power of recollection of the events in question.

As for his power of communication, Leslie Jr.'s testimony was logical, internally consistent, and precise. Having studied a variety of subjects in school, he understood various nuances of word meaning (Tr. 30, 66). We strongly submit that appellant's various innuendos directed at Leslie Jr.'s intellectual capacity, founded principally on the *non sequitur* that he repeated two grades in school, are eminently belied by a record revealing his testimony to be responsive and cogent. The record also reveals fully that Leslie understood the full import of the moral pledge he took to tell the truth. In

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[11] *Beausoliel* v. *United States*, 71 App. D.C. 111, 113, 107 F.2d 292, 294 (1939) (six-year-old child ruled competent to testify).

[12] *Doran* v. *United States*, 92 U.S. App. D.C. 305, 205 F.2d 717 (1953).

the first place, during a thorough examination he said he did (Tr. 26, 27). He said he knew that telling lies would subject him to punishment and the court advised him that that punishment would be jail. (Tr. 26, 27). Leslie Jr. also testified that he had been to church and to Sunday school (Tr. 29).

For these reasons, and in consideration of the less rigorous qualification of appellant's daughter as a witness and the incredibly inconsistent tale he and his wife chose to present the jury, we think Judge Green committed no error whatever in determining that Leslie Jr. was qualified to testify concerning the events in question. Appellant's claim to the contrary is a common one.[13] We have noted that its acceptance would effectively insulate the trial process from the less articulate members of the community and make it the forum of the glib. We cannot abide by that result.

II. The trial court properly submitted the second degree murder issue to the jury.

Appellant urges that "the trial court should have granted the defendant's motion for acquittal of second degree murder" (App. Br. 8). We think this contention wholly without merit.

On appeal, if evidence is asserted to be insufficient, it must be reviewed in a light most favorable to the government, making full allowance for the right of the jury to draw justifiable inferences of fact from the evidence adduced at trial and to assess the credibility of witnesses before it.[14] Appellant gives this settled dictum but a brief passing nod. Then through omission of crucial Government evidence and reliance on "uncontradicted" defense testimony, he urges to excess that the evidence

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[13] See, *e.g.*, *United States* v. *Walter E. Ashe*, D.C. Cir. No. 22,654, now pending before this Court.

[14] *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947); *Morton* v. *United States*, 79 U.S. App. D.C. 329, 147 F.2d 28, *cert. denied*, 324 U.S. 875 (1945).

below showed only a "mutual affray" [15] in which without malice he happened to kill the deceased.

First, as he did in his fact statement, appellant in presentation of this argument fails to note that after he shot the deceased with his gun in the neck, he told his wife "I meant to shoot him in the head" (Tr. 45). Thereafter, as he went to get a towel to put under the victim's head, appellant announced "let the (cuss word) die" (Tr. 46). The appellant gave the gun to his wife, telling her to hide it (Tr. 75). Moreover, the Government's evidence showed that appellant started the fight with the deceased, in the course of which he smashed the deceased over the head with a broken bottle. Sometime thereafter, the deceased sought to withdraw and retreated from the closet area to the living room. The deceased was without a weapon this time as he had been throughout the fight. Appellant himself then left the closet area and walked to the middle of the dinette-kitchen area. Unthreatened by the deceased who stood some 15 to 18 feet away, appellant removed a .38 caliber pistol from his pocket and shot Leslie in the neck.[16] The victim fell to the living room floor where he was found by police shortly thereafter. (Tr. 36-45.) Appellant might also have noted that at the time of the offense he was eleven years younger than the forty-year-old deceased.

We think the jury most properly could have determined that appellant coolly and without heated passion intended to kill the deceased, as indeed he said he did immediately after the offense. And it further could have found that this intention was effected without any self-defense need whatever, the deceased having retreated from his attacker to another room, standing there weaponless. Appellant's posture of "mutual affray" and his

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[15] This phrase, apparently capturing the posture of the facts appellant finds most advantageous, appears six times in the space of two and one-half pages (App. Br. 9-11).

[16] Malice, of course, might have been inferred from this alone.

claim that the record affords no basis for an inference of malice is absurd.

Moreover, appellant's less than candorous argument relies on his own testimony at trial, assertedly uncontradicted by the Government (App. Br. 10). Neither *Curley* nor *Crawford* sanctions any such reliance. And appellant's testimony was indeed contradicted in every crucial aspect by the Government's. Incredibly, it was contradicted in numerous crucial aspects by that of appellant's own wife (*supra*, pp. 5-6) Appellant can hardly ask this Court to give it credence now.

III. The trial court properly ruled inadmissible an alleged statement made by the deceased to appellant constituting a threat to a third party.

Appellant at trial responded to the Government's case with a claim of self defense. To that end, he ranged far afield during his testimony and that of his wife detailing various assaultive conduct the deceased had allegedly engaged in. He testified as to the asserted effects of alcohol on the deceased and the extent to which it agitated the deceased. Through testimony of his wife, alleged threats to appellant's life by deceased on the night in question were set out.

Appellant claims he deserved more, namely that the trial court should have admitted an alleged threat made by the deceased to appellant concerning a third party on the night in question (App. Br. 15-19). Specifically, appellant sought to testify that the deceased wanted the gun appellant had purchased that evening for the purpose of killing someone else. The trial court ruled, and we think most properly, that appellant might detail to the jury, besides the variety of assault his conduct proffered, threats made to him but not to a third party. (Tr. 163-165).

In the first place, the questioned statement is not particularly relevant to appellant's apprehension of danger on the night in question. Whatever alleged use the deceased said he had for the gun appellant purchased, by

all accounts appellant had total possession and control of the gun immediately before and at the time he shot and killed the deceased. He can hardly claim he thought the deceased had that gun. Moreover, the statement in question and the testimony of entire dispute because appellant would not turn over the weapon cut decidely against appellant's self defense claim.

Those circumstances showed that appellant realized on the night in question that he had the only gun to which the deceased had access. Thus, whatever fear he claimed he apprehended, it certainly was not founded on a belief that the deceased had any gun.

The trial court gave appellant wide latitude in adducing a variety of testimony showing conduct and statements of the deceased bearing on appellant's apprehension of fear at the time he shot the deceased. And it allowed appellant to provide that testimony without fear of admission of several prior assault convictions. The single piece of proffered testimony denied him, largely irrelevant and disadvantageous, cannot now serve as a basis of reversal.[17]

IV. The trial court properly instructed the jury.

Appellant makes a last ditch attack on several of the trial court's instructions to the jury. He attacks as incomplete the trial court's instructions on malice, manslaughter and self-defense (App. Br. 20-24). Appellant in no sense objected to these instructions below. Absent a showing of plain error affecting substantial rights, he cannot now obtain reversal.[18] Essentially appellant attacks nothing the trial court said. His sole complaint, as to the malice, manslaughter and self-defense instructions, is that the trial court should have given various elabora-

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[17] Appellant's case support is all irrelevant. None deals with threats made by the deceased to a third party in the circumstances of this case.

[18] *Kelly* v. *United States*, 124 U.S. App. D.C. 44, 361 F.2d 61 (1966).

tions. Having chosen to accept those instructions as they were given at trial, and in light of the fact that each conforms substantially to that ordinarily deemed to be the norm in this jurisdiction,[19] appellant's recent hindsight is a manifestly insufficient basis on which to predicate reversal. Certainly he suffered no prejudice to substantial rights.

In a final footnote, appellant urges that the trial court should have given an instruction on assault with a deadly weapon, which he requested. The jury having found him guilty of second degree murder, appellant cannot now urge that a compromise might have ensued had that instruction been given.[20] Moreover, notwithstanding appellant's characterizations, causality of the deceased's death was categorically ascribed to the gunshot appellant inflicted.

In the last analysis, appellant was convicted not because of some subtle nuance in jury instructions. He was convicted because the Government presented substantial and convincing evidence of his intentional and malicious killing of the deceased and because he presented as a defense testimony so incredibly inconsistent as to be patently unworthy of belief.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
ROGER E. ZUCKERMAN,
Assistant United States Attorneys.

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[19] Each instruction was virtually that prescribed in the Junior Bar Criminal Jury Instruction guide.

[20] Cf. *Fuller* v. *United States*, D.C. Cir. No. 19,532, decided November 20, 1967, decided *en banc* September 28, 1968.

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UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 22,683

Sidney Hardin, Appellant-Petitioner

v.

United States of America, Appellee-Respondent

Petition for Rehearing In Banc

Robert J. Hickey, Esquire
Kenneth F. Hickey, Esquire
Attorneys for Appellant

Cr. No. 1214-67

JURISDICTION

Appellant was convicted of second degree murder and was sentenced to a term of 8 to 24 years. His conviction was affirmed by the majority of a panel of the United States Court of Appeals on December 22, 1970. Thereafter, on January 15, 1971 an Order was filed extending the time for the submission of Appellant's Petition For Rehearing to and including January 25, 1971. This Petition For Rehearing In Banc is filed pursuant to Rules 35 (c) and 40 of the Federal Rules of Appellant Procedure.

I. The Court's failure to rule on the trial court's basis for exclusion of evidence, has created a precedent in conflict with the clear weight of judicial authority.

It is respectfully suggested that a rehearing should be ordered because the decision in the above-entitled case conflicts with another decision of this Court and with a decision of the United States Supreme Court. It is also inconsistent with the unanimous view of the leading commentators on the law of evidence.

The Appellant at trial sought to introduce certain remarks made by the decedent,to the effect that the decedent had asked the Appellant to obtain a gun so that the decedent might use it against a third party. This evidence was introduced to establish the decedent's violent character and concomitantly, the Appellant's reasonable fear for his own life during the struggle that resulted in the decedent's death. The trial judge believing it to be hearsay refused to admit testimony concerning the conversation. In so doing, she indicated that a threat to a third party could "not bolster a self-defense defense." (Record, pp. 160-166, quoted in Appellant's brief at pp. 16-18.)

On appeal, the Appellant argued that the Court erred in exclusing the statement as hearsay. Moreover, because it was offered as evidence of the Appellant's state of mind rather than for its own truth, the statement was relevant as indicating "the reasonable apprehensions of the defendant". Appellant's Brief at p. 19. The

Opinion of the Court of Appeals summarily affirmed the exclusion with the following comment:

> "He wished to introduce this evidence for the purpose of showing his own state of mind. However, it was admitted that during the course of the affray in the apartment, the appellant had exclusive control of the gun. Also, the alleged conversation was irrelevant and incompetent to show that the deceased intended to kill the appellant nor would such a statement have shown any malice towards the appellant. For these reasons the trial court properly excluded this testimony."

It is submitted that the Court failed to focus on the Appellant's reasons for the proffer and has thereby ruled in a way inconsistent with the settled law both in the District of Columbia and in other jurisdictions. More specifically, this Court ignored the trial judge's basis for excluding this evidence, i.e., that it constituted hearsay. It is apparent from the quoted portions of its Opinion that the Court mistakenly believed that the conversation was offered to show that the decedent might have been armed, might have had malice or an expressed intention to kill the Appellant. Rather, it was offered as evidence of the Appellant's apprehension concerning the decedent's character, i.e., the latter's capacity, when angry, to think in terms of deadly violence. As such, it was not hearsay and was material, relevant and admissible.

In Evans v. United States, 107 U. S. App. D. C. 324, 277 F.2d 354 (1960) the Appellant who was convicted for second degree murder had unsuccessfully sought to introduce testimony from the deceased's wife to the effect that the deceased when

drinking "would even go to the extent of being psychotic, perhaps, and with her at least she would know -- acted belligerent and in a really bellicose type of manner." This Court reversed, agreeing with the Appellant that "the deceased's 'character and belligerency' is admissible in corroboration of the defendant's testimony that the deceased was the agressor." In addition the Court recognized that "specific acts of violence as well as the general reputation of the deceased for cruelty and violence are admissible in support of the theory of self-defense." Id. at 325 n.2, 277 F.2d at 355 n.2. The deceased's threat directed at a third party in the instant case is an example of the violent behavior found admissible in Evans, supra; cf. Marshall v. United States, 45 App. D.C. 373, 383 (1916).

In Williams v. Great Southern Lumber Co., 277 U.S. 18 (1928) the Supreme Court ruled that the trial court had erred in excluding remarks made by a witness shortly before a fracas that ended in the death of one of the participants. The question in the case was whether a certain group was a posse comitatus or a mob, which question further turned on whether the police had acted reasonably in assembling the group. The testimony at issue was threatening language made by third parties and heard by a police officer who communicated it to the Chief of Police. The Court held that the evidence of third party threats was relevant to the reason why

the Chief assembled the group and to the basis for the issuance of the arrest warrants. Similarly in the instant case the proffered testimony concerning the decedent's threats was relevant to the appellant's state of mind at the time of the affray.

It is well settled in other jurisdictions that evidence of threats to third parties is both relevant and admissible. For example, in Jones v. State, 183 Md. 53, 35 A.2d 916, 919 (1944), the Maryland Court of Appeals stated:

> "Where the defendant claims that he acted in self-defense, and there is some testimony of an overt act on the part of the deceased and some testimony tending to support the theory of self-defense, where the necessity for the defendant's resorting to it should be judged of by the facts as they appeared to him, whatever they truly were, he may give in evidence whatever he knew of the character, prior conduct, threats or other utterances of the person with whom he was contending, which is admitted in evidence, not to show that the deceased was bad, but in this special instance was dangerous."

A previous threat to a third-party was considered in People v. Davis, 408 P.2d 129 (Cal.Sup.Ct. 1965). In that case the Court considered the testimony introduced at trial to establish the deceased's violent character. The Court noted that the defendant had testified about several incidents where the deceased in conversations with the defendant had threatened to kill the deceased's wife: "'If I find that SB I'm going to put his knife around her _____ _____ neck; 'that defendant saw deceased later that evening and he again stated that he intended to kill Mattie.'" Id. at 134.

In Harris v. State, 400 P.2d 64 (Okla. 1965) the Court on appeal commented on the testimony at trial as follows:

> "Thereafter, the defense called numerous witnesses who testified to threats of violence toward the defendant and others, and to specific acts of violence communicated and uncommunicated and to the reputation of the deceased as being a dangerous and violent man. Great latitude was given the defense in the introduction of this testimony which was in keeping with the rules enunciated...Under these authorities above cited it is generally held that in a homicide prosecution, where the plea is self-defense and there is some evidence other than threats tending to support the plea, proof of threats made by the deceased, communicated or uncommunicated to the defendant, is admissible,..." Id. at 70, (emphasis added).

Similarly in Boyle v. State, 97 Ind. 322, the Court stated:

> "As, in personal conflicts, every man is permitted, within reasonable limits, to act upon appearances and to determine for himself when he is in real danger, it would seem to follow, as an inevitable consequence, that whoever relies upon appearances, and a reasonable determination upon such appearances, as a defense in a case of homicide, ought to be allowed to prove every fact and circumstance known to him, and connected with the deceased, which was fairly calculated to create an apprehension for his own safety. Any narrower rule than this would, we think, prove inadequate to full justice in all cases of homicide, and would, in many cases, operate as a serious abridgment of the law of self-defense." (emphasis added) , quoted in, Holt v. State, 170 Tenn. 65, 92 S.W.2d 397 (1936).

Moreover, the admissibility of evidence concerning the deceased's violent character is well accepted by the leading commentators on the law of evidence. Wigmore, Evidence 3rd Ed. §§198, 248, McCormick Evidence, §160, pp. 339-40 n.2.

As noted earlier, the trial court here excluded the testimony on the ground that it was hearsay. Appellant contended on appeal

that the testimony was not offered for its truth but rather for the fact that it was said and consequently was admissible as a "verbal act". As Appellant's trial attorney stated:

> "We think that such conversations would be admissible as circumstantial evidence rather than testimonial -- not to prove the truth of what deceased said but merely to prove that the statements were made and that the defendant as a result of the statements became apprehensive." Record p. 160.

It is worth noting that the Government did not dispute this contention. The admissibility of a verbal act is well established in the decisions of the Courts of Appeals for the various Circuits. See, e.g., Overton V. United States, 403 F.2d 444, 447 (5th Cir. 1968); United States v. Mirani, 422 F.2d 150, 153 (6th Cir. 1970); Wigmore, Evidence, §1766 (3rd Ed.).

Again it is apparent that the Court of Appeals held the belief that even if the excluded testimony was relevant, it should not have been admitted into the record. The Court assumed that under any set of circumstances a man with a gun could not be apprehensive of another without a gun even though the latter has expressed a violent disposition. We believe this is contrary to experience. However, more to point this is a question of fact for the jury and the Court's ruling created prejudicial error. As the North Carolina Supreme Court commented in State v. Johnson, 270 N.C. 215, 154 S.E.2d 48 (1967). "It remains in the province of the jury to decide whether the incidents occurred or whether the defendant's apprehension

was a reasonable one." In a similar context this Court has stated that:

> "...even if it convincingly appeared that the excluded testimony could not induce the jury to acquit, evidence suggesting he was the aggressor might well have induced the jury to convict appellant for the lesser included offense of manslaughter, instead of second degree murder." Evans v. United States, 107 U.S. App. D.C. 324, 326, 277 F.2d 354, 356 (1960).

Accordingly, the Court should reverse and remand for a new trial.

II. The decision of the Panel failed to take proper cognizance of the plain error in the instructions.

A. Appellant had argued in its brief that the trial court's instruction on a manslaughter was inadequate insofar as it failed to adequately discuss "mutual combat" in the context of this case. Appellant's brief at pp. 21-22. Although the Court acknowledged the absence of detailed discussion, it held that the mere mention of "mutual combat" in the instructions was adequate, since that was sufficiently self-explanatory, and did not require elaboration by the trial court to a reasonably intelligent jury. Appellant contends that the Court's reasoning is contrary to experience. Thus, if the term is self-explanatory, why is it necessary for a leading expert on criminal law to devote four pages to its discussion. See, Roland Perkins, Criminal Law, pp. 46-49.[1/] However, since the importance of this term in the context of this case and the failure of the trial court to elaborate on it are adequately detailed in the dissenting opinion, Appellant petitions this court to adopt the views of the dissenting opinion.

B. In its brief to this court, Appellant further argued that the failure of the trial court in its charge on self-defense to instruct on degrees of reasonableness in the hot blood/cold blood

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1/ In its opinion, the Court cites two cases as bearing on the issue of a layman's understanding of the terms. See, Slip opinion p. 6, fm. 7. These cases concerned the jury's understanding of the word "home" and "arrange". How these can be compared to "mutual combat" is quite questionable.

context, constituted reversible error. Appellant's brief at pp. 22-23. In support of this contention, Appellant relied upon Inge v. United States, 123 U.S. App. D.C. 6, 9, 356 F.2d 345, 348 (D.C. Cir. 1966). This Court, in holding that the trial court's charge was "a fair statement of the law of self-defense", failed to consider the Inge case. Because the holding in the instant case is in conflict with the Court's earlier Inge decision, Appellant again urges that this Court reconsider its decision, apply the teachings of Inge and hold the instructions constituted reversible error.

Respectfully submitted,

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Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached Petition For Rehearing In Banc has been sent this day to John Terry, Esquire, Assistant United States Attorney for the District of Columbia postage prepaid.

Dated at Washington, D.C., this 25 day of January 1971.

Kenneth F. Hickey

KENNETH F. HICKEY, ESQUIRE,
ATTORNEY for APPELLANT